Bauer (M) Sdn Bhd v Embassy Court Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-178 OF 2011
AMELIA TEE ABDULLAH J
8 FEBRUARY 2013

Evidence — Witness — Competency and compellability — Cross-examination of arbitrator on award — Scope of questions that could be posed — Whether arbitrator could only be questioned about matters concerning arbitration but not about grounds of decision — Whether arbitrator a competent witness — Final award of arbitrator registered as judgment of High Court without contest — Attempt to set aside/vary award struck off by High Court — Whether res judicata prevented validity of final award from being questioned

During the trial of the instant suit an issue arose as to the extent to which an arbitrator, who was a witness, could be questioned with respect to a final award ('the award') he had made concerning the parties.The award, which was tendered as an exhibit in the trial,ordered the first defendant to pay the plaintiff a certain sum of money with interest. The plaintiff said the award had been registered as a judgment in the High Court without resistance from the defendants who neither appealed against the registration nor applied to stay the enforcement of the award. Instead, the defendants applied to a separate High Court to set aside or vary the award which application the plaintiff successfully applied to strike out. As a result, the plaintiff contended that the defendants were barred by res judicata from questioning the arbitrator on the same issues they had raised in their application to set aside/vary the award.

Held, defining the scope of questions that may be posed to the arbitrator:

(1) An arbitrator was a competent witness, and if called as a witness in respect of an arbitration conducted by him, he may be asked such questions as to what had gone on during the arbitration but not as to what went through his mind at the time he made his decision or as to the grounds of his decision (see para 49).

(2) In the present case the arbitrator's award was registered as a judgment of the High Court and it stood and spoke for itself. Whilst the arbitrator could be questioned with regard to the scope of his jurisdiction, what claims were put forward by each side, which claims were admitted and which were rejected, what admissions were made by the parties and what evidence was adduced before him, he could not be questioned as to what went through his mind when he made his decision or the grounds of his award or be asked to explain how he came by his decision (see para 41).

(3) Although arbitrators were not mentioned in s 121 of the Evidence Act 1950 which provided that High Court judges, sessions court judges and magistrates were not compellable to answer any questions as to their conduct in court as judges or magistrates, they were nevertheless competent witnesses just like judges and magistrates. Persons who carried out judicial functions should not be compelled to answer questions about their judgments and decisions. Their written judgments and decisions spoke for themselves, as did the written award of an arbitrator (see paras 38 & 40).

(4) Res judicata applied in the instant case to estop the second defendant from raising issues that were already decided upon by a court of competent jurisdiction. No questions could be put to the arbitrator which had the effect of questioning the validity of the award. With the registration of the interim and final awards as judgments of the High Court and the striking out of the defendants' application to set aside or vary the awards, the issue of the validity of the awards had been decided with finality. Any unhappiness or dissatisfaction should be taken up at a higher court and not be re-ventilated in the High Court (see paras 45).

[Bahasa Malaysia summary

Semasa perbicaraan tindakan ini isu berbangkit terhadap setakat mana penimbang tara, yang merupakan seorang saksi, boleh dipersoalkan berkaitan award muktamad ('award') yang dibuatnya berkenaan pihak-pihak. Award, yang dimasukkan sebagai ekshibit di dalam perbicaraan, memerintahkan responden pertama membayar kepada plaintif jumlah tertentu berserta faedah. Plaintif menyatakan award tersebut telah didaftarkan sebagai penghakiman di Mahkamah Tinggi tanpa bantahan daripada defendan-defendan yang tidak merayu terhadap pendaftaran ataupun memohon untuk penangguhan penguatkuasaan award tersebut. Sebaliknya, defendan-defendan memohon kepada Mahkamah Tinggi yang lain untuk mengetepikan atau mengubah award tersebut yang mana permohonan untuk pembatalan berjaya dipohon oleh plaintif. Hasilnya, plaintif berhujah bahawa defendan dihalang oleh res judicata daripada mempersoalkan penimbang tara atas isu yang sama yang dibangkitkan oleh mereka dalam permohonan mereka untuk mengetepikan/mengubah award tersebut.

Diputuskan, menentukan skop soalan-soalan yang mungkin boleh dikemukakan kepada penimbang tara:

(1) Penimbang tara adalah saksi kompeten, dan jika dipanggil sebagai saksi berkaitan timbang tara yang dijalankan olehnya, dia boleh ditanya soalan-soalan seperti apa yang berlaku semasa timbang tara tetapi bukan apa yang difikirkannya semasa dia membuat keputusan atau terhadap alasan keputusannya (lihat perenggan 49).

(2) Dalam kes ini award penimbang tara didaftarkan sebagai penghakiman Mahkamah Tinggi dan ia tidak perlu dijelaskan. Sementara penimbang tara boleh dipersoalkan berkaitan kepada skop bidang kuasanya, tuntutan apa yang dibangkitkan oleh setiap pihak, tuntutan yang mana yang dimasukkan dan yang mana ditolak, pengakuan apakah yang dibuat oleh pihak-pihak dan keterangan apakah yang dikemukakan di hadapannya, dia tidak boleh dipersoalkan terhadap apa yang difikirkan olehnya semasa membuat keputusannya atau disoal untuk menjelaskan bagaimana beliau mencapai kepada keputusan tersebut (lihat perenggan).

(3) Walaupun penimbang tara tidak dinyatakan di dalam s 121 Akta Keterangan 1950 yang memperuntukkan bahawa hakim-hakim Mahkamah Tinggi, hakim-hakim mahkamah sesyen dan majistret-majistret, tidak boleh dipaksa untuk menjawab apa-apa soalan terhadap tindakan mereka di mahkamah sebagai hakim-hakim atau majistret-majistret, mereka adalah saksi kompeten seperti juga hakim-hakim dan majistret-majistret. Orang-orang yang menjalankan fungsi kehakiman tidak sepatutnya dipaksa untuk menjawab soalan mengenai penghakiman dan keputusan mereka. Penghakiman bertulis dan keputusan mereka tidak perlu dijelaskan, seperti juga award bertulis penimbang tara (lihat perenggan 38 & 40).

(4) *Res judicata* diguna pakai dalam kes ini untuk mengestop defendan kedua daripada membangkitkan isu-isu yang telah diputuskan oleh mahkamah yang mempunyai bidang kuasa berkompeten. Tiada soalan boleh ditujukan kepada penimbang tara yang mempunyai kesan mempersoalkan kesahan award. Dengan pendaftaran award interim dan award muktamad sebagai penghakiman Mahkamah Tinggi dan membatalkan permohonan defendan-defendan untuk mengetepikan atau mengubah award-awarad tersebut, isu keesahan award-award telah diputuskan dengan muktamad. Apa-apa ketidakpuasan hati patut dibawa ke mahkamah lebih tinggi dan bukan disuarakan semula di Mahkamah Tinggi (lihat perenggan 45).]

Notes

For cases on competency and compellability, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3130–3132.

Cases referred to

Amir Begam v Badruddin 23 IA 625; 36 A 336; 19 CLJ 494 (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysia Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)

Co-Operative Wholesale Society Ltd v Ravenseft Properties Ltd, Douglas Shelf Seven Ltd [2002] SCLR 644 (refd)

Ellis v Deheer [1922] 2 KB 113, CA (refd)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)
Kumpulan Promista Development Sdn Bhd v Haw Ah Bee Construction Sdn Bhd [1999] 4 MLJ 680, HC (refd)
Ladd v Marshall [1954] 3 All ER 745, CA (refd)
Land Securities plc v Westminster City Council [1993] 4 All ER 124, Ch D (distd)
Mahomed Syedol Ariffin v Yeoh Ooi Gark [1916] 2 AC 575, PC (refd)
Mathews and Ford, Re [1973] VR 199, SC (refd)
Most Noble The Duke of Buccleuth and Queensberry, The v The Metropolitan Board of Works [1871] 5 HL 418, HL (refd)
Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services, a firm) v Sang Lee Co Sdn Bhd & Ors [2010] 2 MLJ 661; [2010] 3 CLJ 924, CA (refd)
PP v Alang Mat Nasir bin Anjang Talib [1938] 1 MLJ 153 (refd)
Recher & Co v North British and Mercantile Insurance Company [1915] 3 KB 277, KBD (refd)
Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors [2002] 2 MLJ 591, HC (refd)
Ward v Shell-Mex and BP Ltd [1952] KB 280, KBD (refd)
Warren v Warren [1997] QB 488, CA (refd)
Whiteley and Roberts' Arbitration, In re [1891] 1 Ch 558, Ch D (refd)

Legislation referred to

Civil Law Act 1956 s 3
Evidence Act 1950 ss 118, 121, 145
Indian Evidence Act 1872 [IND] s 121
National Insurance (Industrial Injuries) Act 1946 [UK]

Sanjay Mohanasundram (Mohd Raihan Abd Khalip with him) (Kadir Andri & Partners) for the plaintiff.
Ringo Low (Ting Lee Ping with him) (Ringo Low & Assoc) for the first defendant.
Dato' Manpal Singh Sacdev (Tan Weng Hung with him) (Manjit Singh Sachdev, Mohammad Radzi & Partners) for the second defendant.

Amelia Tee Abdullah J:

RULING

(Scope of questions which may be posed to an arbitrator)

[1] The plaintiff, Bauer (M) Sdn Bhd's claim against the first defendant, Embassy Court Sdn Bhd, is for an order for specific performance requiring the first defendant to produce the corporate guarantee issued by the second defendant, Magna Prima Bhd, based on the terms of the draft corporate

guarantee prepared by the plaintiff or such terms as may be deemed appropriate by the court. The plaintiff's claim against the second defendant is for an order that the second defendant indemnify or pay to the plaintiff such monies as may be determined by the arbitrator to be payable by the first defendant to the plaintiff.

[2] The hearing of the suit was completed on 29 December 2011. Whilst the case was awaiting the decision of the court the plaintiff applied for leave to adduce the final award dated 3 February 2012 where the arbitrator had ordered a sum of RM18,718,966.28 to be paid by the first defendant to the plaintiff together with continuing interest at the rate of 8%pa from 4 February 2012 until the date of realisation. The final award was only delivered by the arbitrator on 3 February 2012 and was not available before 2 February 2012.

[3] On 2 May 2012, the court found that the three requirements as set out in *Ladd v Marshall* [1954] 3 All ER 745 had been satisfied. The court was of the view that it was a fit and proper case for the court to exercise its discretion to allow the plaintiff to adduce the final award dated 3 February 2012. The court, in making the said decision, had also allowed the defendants to recall their witnesses (if any) or to call fresh witnesses, but only insofar as it relates to the evidence of the final award.

[4] Continued hearing for this case was somewhat delayed as the court had granted a stay of proceedings pending the second defendant's application for leave to appeal to the Court of Appeal. The second defendant's leave application was subsequently dismissed and thereafter the case was set down for continued hearing for the plaintiff to adduced evidence as to the final award.

[5] On 14 December 2012, the plaintiff had called the arbitrator, Cheong Ah Hing @ Chong Pick Eng, as its witness. Evidence was adduced as to his publishing of the final award (save as to costs) which was tendered in court and marked as exh P17. In the course of cross-examination of the arbitrator, questions were posed to him as to the interim award, the supplemental agreement or supplemental contract, the building agreement and what he had taken into consideration when coming up with the final award.

[6] When the case was called for continued hearing on 3 January 2013, learned counsel for the plaintiff had raised an issue as to the sort of questions which can be put to an arbitrator. Learned counsel for the second defendant professed that he was caught by surprise with this turn of events. The court had allowed time for him to carry out the necessary research into this issue.

[7] As such, the present issue before the court is this: How much can an arbitrator be questioned. A secondary issue is whether res judicata would apply

in this case.

THE PLAINTIFF'S SUBMISSIONS

[8] Learned counsel for the plaintiff has raised two issues, namely:

(a) the *Queensberry*'s case; and

(b) res judicata.

[9] Learned counsel for the plaintiff has referred the court to a number of cases, namely, *The Most Noble The Duke of Buccleuth and Queensberry v The Metropolitan Board of Works* [1871] Law Rep 5 HL 418 ('the *Queensberry*'s case'), *Ward v Shell-Mex and BP Ltd* [1952] KBD 280, *Warren v Warren* [1997] QBD 488, *Re Mathews and Ford* [1973] VR 199 and *Co-Operative Wholesale Society Ltd v Ravenseft Properties Ltd, Douglas Shelf Seven Ltd* [2002] SCLR 644.

[10] Learned counsel had submitted that although we have the Evidence Act 1950, nevertheless it is up to the discretion of the court how much to allow the arbitrator to be cross-examined. In this context, it was submitted that the court can be guided by the English (and Australian) authorities.

[11] On the second issue of res judicata, it was submitted that the first and second defendants had filed an action in the Shah Alam High Court to set aside the interim and final awards. The plaintiff had applied to strike out the suit on grounds, inter alia, that the award had already been enforced. The plaintiff's action for striking out was allowed on 27 December 2012. As such, it was submitted that two competent High Courts had found it fit for the award of the arbitrator to be accepted.

[12] The interim award, when it was enforced, was appealed against and the Court of Appeal had dismissed an application by the first defendant to resist the enforcement. The second defendant was a party to the application in Shah Alam to set aside the award. To date, there has been no appeal against the decision. This means that this is the second defendant's second attempt to revisit the award by challenging the decision of the arbitrator.

[13] Learned counsel for the plaintiff had referred the court to the application which was filed by the defendants in the Shah Alam High Court. According to counsel, prayers 2, 3, 4 and 5 were all issues which the second defendant is raising here. These issues were raised and canvassed at the Shah Alam High Court which had struck off the suit.

[14] Reference was made to the case of *Badiaddin bin Mohd Mahidin & Anor*

v Arab Malaysia Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75 where the Federal Court had dealt with the issue of one court setting aside a perfected judgment of another court of concurrent jurisdiction. Reference was also made to the case of *Kumpulan Promista Development Sdn Bhd v Haw Ah Bee Construction Sdn Bhd* [1999] 4 MLJ 680 where the High Court had dismissed an application to set aside an arbitration award and an application for leave to file such application for extension of time as to allow the extension would, in effect, be setting aside the order made by a court of coordinate jurisdiction.

THE SECOND DEFENDANT'S SUBMISSIONS

[15] In response, learned counsel for the second defendant had urged the court to note that s 121 of the Evidence Act 1950 does not include the arbitrator as a class of persons who are not to be compelled to answer questions as to their conduct in court. As pointed out by counsel, the question that arises is whether common law and English authorities on this issue are applicable in Malaysia. In support of his argument that they are not applicable, reference was made to three cases, namely:

(a) *Public Prosecutor v Alang Mat Nasir bin Anjang Talib* [1938] 1 MLJ 153;

(b) *Mahomed Syedol Ariffin v Yeoh Ooi Gark* [1916] 2 AC 575; and

(c) *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591.

[16] Learned counsel had submitted that if the court accepts that the *Queensberry*'s case applies, then, even so, the arbitrator is still the best person to give evidence as to the award — what documents he took into account when he came to his award. It was also pointed out that in the *Queensberry*'s case, the arbitrator was giving evidence-in-chief, as compared with the present case where he was being cross-examined. In this context, learned counsel had referred the court to the case of *Recher & Co v North British and Mercantile Insurance Company* [1915] 3 KBD 277 where the court allegedly did not limit cross-examination.

[17] In respect of the issue of res judicata, it is the second defendant's submission that res judicata does not apply. The question that is asked is this: was the Shah Alam case dismissed or was it struck off? To this question, learned counsel for the plaintiff had responded that there was an application to strike off which was allowed. However, during the hearing, all the merits of the case were before the judge who had the advantage of both written as well as oral submissions. Although counsel was unable to confirm if the judge had considered the merits, however he had reiterated that all the facts and arguments were before the judge.

[18] To this end, the response of the second defendant was that they were merely defending the plaintiff's claim and questioning the evidence of the plaintiff in their attempt to prove their case. Here, they were merely questioning the arbitrator over the final award because essentially, they were not a party to it.

THE COURT'S FINDINGS AND RULING

[19] The first question for consideration is whether the English and other non-Malaysian authorities on this issue as submitted by learned counsel for the plaintiff would be applicable here. The court has carefully perused the various cases cited and relied upon by the plaintiff. In the case of *The Most Noble The Duke of Buccleuth and Queensberry v The Metropolitan Board of Works*, the plaintiff Duke had brought an action against the defendants to recover a sum of £8325 being the amount awarded to him by an umpire selected by two arbitrators. The question that arose for consideration was whether the said sum awarded included damages and compensation for matters and things in respect of which neither the arbitrators nor the umpire had any power or right to award or assess damages and compensation, and over and in respect of which neither the said arbitrators nor the umpire had any jurisdiction whatsoever.

[20] In that case, the Law Lords were of the view that an arbitrator may be called as a witness in a legal proceeding to enforce his award. He may be asked questions as to what passed before him, and as to what matters were presented to him for consideration. However no questions could be put to him as to what passed in his own mind when exercising his discretionary power on the matters submitted to him. As was succinctly held by Mr Baron Cleasby:

> As soon as the award is made it must speak for itself. It must be applied, as in other cases, by extrinsic evidence to the subject matter, but cannot be explained or varied or extended by extrinsic evidence of the intention of the person making it. There appears to me to be the strongest objections against allowing the umpire to be examined for the purpose of shewing what he intended to be included in the award.

[21] And in the case of *In re Whiteley and Roberts' Arbitration* [1891] 1 Ch 558, it was held that the evidence of an admission out of court by an arbitrator that he had made his award improperly was not admissible in support of an application to set aside the award.

[22] In *Ward v Shell-Mex and BP Ltd*, Streatfeild J held that the evidence of a doctor who was a member of a medical board set up under the National Insurance (Industrial Injuries) Act 1946 to testify, not as an expert but as a member of a judicial statutory body, with regard to the workman's condition when he had examined him in the course of his duties as a member of the

board, was inadmissible. Although an arbitrator may be called to give evidence as to what took place in the hearing before him, what issues were raised, and so on, it was not competent, nor was it relevant, for him to explain, and still less vary, the award which he gave and which must stand upon its own footing.

[23] The case of *Warren v Warren* involved a situation in matrimonial proceedings where a witness summons was served on a district judge requiring him to tender his evidence as to the extent of the undertaking that was given by the wife. The district judge had declined to be interviewed or to give any preparatory statement. Following the dismissal of the committal proceedings, the wife sought a wasted costs order against the solicitor, which order was granted. However, on appeal by the solicitor, it was held that a judge, whether of the High Court or any other court, was not a compellable witness in relation to his judicial functions. However, the judge will still remain competent to give evidence and if a situation arises where his evidence is vital, he should be able to be relied on not to allow the fact that he cannot be compelled to give evidence to stand in the way of his doing so.

[24] *Re Mathews and Ford* was a decision of the Supreme Court of Victoria involving jurymen. Upon a hearing of a petition for mercy, reliance was placed upon a tape recording of an interview between a newspaper reporter and one of the jury in the trial. In the judgment of the full court, reference was made to the decision of Atkin LJ in *Ellis v Deheer* [1922] 2 KB 113 at p 121 where it was held as follows:

> The general rule is that the Court does not admit evidence of a juryman as to what took place in the jury room, either by way of explanation of the grounds upon which his verdict was given, or by way of statement as to what he believed its effects to be. The reason why that evidence is not admitted is two-fold, on the one hand it is in order to secure the finality of decisions arrived at by the jury, and on the other to protect the jurymen themselves and prevent their being exposed to pressure to explain the reasons which actuated them in arriving at their verdict. To my mind it is a principle which is of the highest importance in the interests of justice to maintain, and an infringement of the rule appears to me a very serious interference with the administration of justice.

[25] In the case of *Co-Operative Wholesale Society Ltd v Ravenseft Properties Ltd, Douglas Shelf Seven Ltd*, the question arose as to whether an arbiter was a competent witness in subsequent proceedings to explain the hypothetical situation relating to his award. There the court held that where proceedings are concerned with the arbitral award as their subject matter, the award speaks for itself, and it is incompetent to lead the evidence of the arbiter to explain his decision, still less to modify or contradict it.

[26] All the authorities cited above are English and Australian authorities. In

summary, the position is that judges, umpires, arbitrators and even jurymen, although competent witnesses, are not compellable witnesses. Whilst questions might properly be put to an arbitrator for the purpose of proving the proceedings before him, so as to arrive at what was the subject matter of adjudication when the proceedings closed, no questions could properly be put to him for the purpose of proving how it was arrived at, or what items it included, or what was the meaning which he intended at the time to be given to it.

[27] The court had enquired from learned counsel for the plaintiff whether he was able to produce local authorities on this point. He confessed that he was unable to do so.

[28] The court notes the second defendant's submission that in Malaysia, we have the Evidence Act 1950 which deals with the law of evidence in judicial proceedings in and before any court. As to who may testify in court, s 118 of the Evidence Act 1950 provides that 'all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind'.

[29] Whilst all persons are competent witnesses, s 121 of the Evidence Act 1950 provides for the non-compellability of High Court judges, sessions court judges and magistrates to answer questions as to their conduct in court. Section 121 reads as follows:

> No Judge and, except upon the special order of the High Court, no Sessions Court Judge or Magistrate shall be compelled to answer any questions as to his own conduct in court as Judge, Sessions Court Judge or Magistrate or as to anything which came to his knowledge in court as a Judge, Sessions Court Judge or Magistrate, but he may be examined as to other matters which occurred in his presence whilst he was so sitting.

[30] It cannot be denied that s 121 of the Evidence Act 1950 does not include arbitrators in the list of persons who cannot be compelled to answer questions as to their conduct in court. The reason for this is obvious. That section was meant for those who adjudicate in a court of law. As an arbitrator cannot be said to preside over such a court, hence the reason for their exclusion in that section.

[31] The court has carefully perused the authorities cited by learned counsel for the second defendant in support of his argument that the common law position in England as espoused by the *Queensberry*'s case and other like cases

would be inapplicable in Malaysia. In *Public Prosecutor v Alang Mat Nasir*, the court was referred to a number of English and Indian authorities. In dealing with them, the court had this to say:

> It does not necessarily follow that English criminal cases, even of the highest authority, are binding on the courts of this territory, and where the Criminal Law and the Law of Evidence has been codified. It may be that in such codifications, distinctions and differences, however slight, may have, intentionally or unintentionally, crept in, which make it imperative for our courts to follow the written as opposed to the unwritten law. Where, however, no such distinctions or differences can be found or in the absence of definite provisions in the written code then as, in the main, the principles on which both laws are founded are the same, decisions of the higher English courts can safely and should be followed.

[32] In the case of *Mahomed Syedol Ariffin v Yeoh Ooi Gark*, the appellant's defence to an action brought by the respondent money-lender was that he was an infant at the time of the transaction. The issue that arose was whether an entry relating to the appellant's birth in a book containing a record of births, deaths and marriages in his family, kept by his father, was admissible in evidence. Both the courts below had held that the entry was not admissible and that the defence of infancy had not been made out.

[33] However, the Privy Council held that the law of the Straits Settlement on the point of the admissibility of such a document was s 32 of the Evidence Ordinance 1893 which states that 'statements written or verbal of relevant facts made by a person who is dead … are themselves relevant facts in the following cases … (5) when the statement relates to the existence of any relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and the statement was made before the question in dispute was raised.' In finding that the document was admissible, the Privy Council had this to say:

> On the first point the view of their Lordships is that the rule and principle of the Colony must be accepted as it is found in its own Evidence Ordinance, and that the acceptance of a rule or principle adopted in or derived from English law is not permissible if thereby the true and actual meaning of the statute under construction be varied, or denied effect.

[34] In the more recent case of *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*, a preliminary issue which arose before the court was whether the plaintiff should be allowed to adduce oral histories of the aboriginal societies relating to their practices, customs and traditions and on their relationship with the land. The plaintiff sought to introduce evidence of oral histories relating to:

(a) The status of the land viz the land use; and

(b) The practices, customs and traditions of the plaintiffs who are 'orang asli' known as Temuans.

The defendants objected on the ground that it offends the hearsay rule. In dealing with this issue, His Lordship Mohd Noor Ahmad J had stated as follows:

> However, in Malaysia, the rules of evidence are codified and the reception of the UK common law under s 3 of the Civil Law Act 1956 does not cover the hearsay rule. We have to look only at the four corners of the EA whether oral histories of aboriginal societies should be accepted and if so, under what circumstances. In this respect s 32(d) and (e) of the EA come into play. Section 32 of the EA permits verbal statements as well I am sure the framers of the EA would have been aware or ought to have been aware that our aboriginal peoples also did not keep or have written records of their histories. That being the case, the evidential difficulties as envisaged should not be a reason for the courts here to create further exceptions to the hearsay rule other than what have been codified, otherwise it will make a mockery of the law. Although the courts in Canada, USA and Australia had adopted a liberal approach in this respect, the courts here must interpret and apply the relevant laws as existing until they are amended.

[35] What then is the legal position on this issue as provided in our Evidence Act 1950? First, a distinction has to be made between competency and compellability. Section 121 of the Evidence only talks about the compellability of judges and magistrates to answer questions as to their conduct in court etc. It does not touch on the competency of judges and magistrates as witnesses. Judges and magistrates remain competent to become witnesses similar to the position of arbitrators under the English common law position.

[36] The commentary on s 121 of the Evidence Act in *Sarkar on Evidence*, (15th Ed), is most illuminating. The rationale for the law excluding or dispensing with some kinds of evidence is the public policy. It was thought that greater mischief would probably result from requiring or permitting their admission, than from wholly rejecting them. And at p 1976, it is stated as follows:

> Judges, arbitrators, and counsel from motives of public policy, enjoy certain privileges as to matters in which they have been judicially or professionally engaged; though like ordinary persons, they may be called upon to speak to any foreign and collateral matters, which happened in their presence, while the trial was pending, or after was ended. It is considered dangerous or at least highly inconvenient to compel judges of courts of record to state what occurred before them in court.

[37] Whilst noting that arbitrators have not been mentioned in the Indian

Evidence Act 1872 (and our Evidence Act 1950), there is a reference to the case of *Amir Begam v Badruddin* 23 IA 625; 36 A 336; 19 CLJ 494 where Lord Parmoor states as follows:

> An arbitrator, selected by the parties, comes within the general obligation of being bound to give evidence, and where a charge of dishonesty or partiality is made, any relevant evidence, which he can give, is without doubt properly admissible. It is, however, necessary to take care that evidence admitted as relevant on a charge of dishonesty or a partiality, is not used for a different purpose; namely, to scrutinise the decision of the arbitrator on matters within his jurisdiction, and on which his decision is final. The limitations applicable to the evidence of an arbitrator as witness in a legal proceedings to enforce his award are stated in the case of *Buccleuch v Met Bd of Works* 1872 LR 5 HL 418, but where charges of dishonesty are made, the court would reject no evidence of an arbitrator which could be of assistance in informing itself whether such charges were established.

[38] After carefully considering the provisions of our own Evidence Act 1950 as well as the common law position as seen through the English authorities cited and the Indian position as represented by the case of *Amir Begam v Badruddin*, the court is of the considered view that the position under our own Evidence Act is not too disparate with the common law position. Whilst it is true that arbitrators are not mentioned in s 121 and therefore do not enjoy the same protection as do High Court judges, sessions court judges and magistrates, of not being compellable to answer questions as to their conduct in court as such judges, sessions court judges and magistrates, they are nevertheless competent witnesses just like judges, sessions court judges and magistrates.

[39] Learned counsel for the second defendant has submitted that the arbitrator can be cross-examined as to his final award under s 145 of the Evidence Act, which refers to a previous statement that was made by him in writing. He contends that the arbitrator's final award is a previous statement made by him in writing. With respect, learned counsel's submission in this regard is clearly misconceived. Section 145 sets out the procedure by which a witness may, in cross-examination, be contradicted by confronting him with his previous statement in writing. In a case such as the instant case where the arbitrator was called merely to produce his final award, the issue of confronting him with a previous contradictory statement does not arise.

[40] In this regard, the court is of the considered view that the basic principles of the common law position as espoused by the English authorities make sound sense and are consistent and in line with the rationale behind s 121 of the Evidence Act 1950, namely that persons who are carrying out judicial functions should not be compelled to answer questions about their judgments and decisions, these are contained in their written judgments and decisions

and, in the case of an arbitrator, in his written award. Just as a judgment or decision of a judge or magistrate speaks for itself, so too would a final award, and more so a final award which has been registered as a decision of the High Court. Further, it is also not inconsistent with the other provisions in our Evidence Act 1950 which requires the court to ensure that only relevant questions are posed to witnesses.

[41] The court thus takes the view that the arbitrator who had issued the final award in this case is a competent witness. He had been called as a witness by the plaintiff and had duly tendered the final award which is before the court. That final award which has been registered as a judgment of the High Court stands and speaks for itself. Whilst the arbitrator can be questioned as regards the scope of his jurisdiction, what claims were put forward by each side, which claims were admitted and which were rejected, what admissions were made by the parties, what evidence was adduced before him, however he cannot be questioned as to what went through his mind when he made his decision nor the grounds of his award. He cannot be asked to explain how he came by his decision. If such questions are asked of him, the court will have no hesitation in putting an instant stop to such questioning.

RES JUDICATA

[42] I now come to the issue of res judicata raised by the plaintiff. What is the significance of the striking out of the Shah Alam High Court OS No 25–73–04 of 2012 suit? The documents reveal that the plaintiff had filed an originating summons to strike out the defendants' motion to set aside or vary the arbitration awards. The two applications, the defendants' setting aside application and the plaintiff's striking out application were heard together.

[43] From the written submissions that were filed and which the court has had the opportunity of perusing, the grounds for the application for striking out are as follows:

(a) There are orders from the High Court registering both the interim award dated 14 January 2010 as well as the final award dated 3 February 2012 as judgments of the High Court on 26 August 2010 and 2 April 2010 respectively. The defendants should have resisted the registration of the final award but had failed to do so;

(b) Once an order is pronounced by a court of competent jurisdiction, a court of similar jurisdiction cannot set aside the order (see *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd*; *Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services, a firm) v Sang Lee Co Sdn Bhd & Ors* [2010] 2 MLJ 661; [2010] 3 CLJ 924; *Kumpulan Promista Development Sdn Bhd* [1999] 4 MLJ 680. The defendants

should have appealed to the Court of Appeal or else applied to stay the enforcement of the order dated 2 April 2012. It is worth noting that the first defendant's appeal against the decision of the arbitrator was dismissed by the Court of Appeal on 8 February 2011 with costs of RM10,000.

[44] The issue of res judicata was also a subject raised in the plaintiff's submissions in the Shah Alam suit. Reference was made to the case of *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 where the Court of Appeal had held as follows:

> Once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and must not be reopened. Although the first decision was made on an interlocutory matter which was purely procedural in nature, it was nevertheless binding on the court and all parties to the lis until its reversal on appeal …

[45] It cannot be disputed that the parties had filed a number of written submissions and replies in the course of the hearing of the application at the Shah Alam High Court. In the final analysis the Shah Alam High Court had struck off the defendants' application to set aside the interim and final awards. In this case, the court is of the view that it does not matter whether the order is a striking out order or a decision made after a full hearing so long as the effect of the order is to refuse to allow the issue of the validity of the awards to be re-opened. The court is in agreement with the plaintiff that in the circumstances of this case where the Kuala Lumpur High Court had registered the awards as judgments of the High Court and the Shah Alam High Court had refused to hear any application to set aside or vary the awards, the issue of the validity of the awards would have been decided with finality. Any unhappiness and dissatisfaction must be taken up at a higher court and not be re-ventilated in the High Court.

[46] One final word on this issue. On 6 February 2013, learned counsel for the second defendant had submitted the case of *Land Securities plc v Westminster City Council* [1993] 4 All ER 124 for the attention of the court. The court's attention was drawn to a passage where Hoffman J had stated as follows:

> It follows that the *Duke of Buccleuch*'s case can have no relevance when the award does not constitute a res judicata between the parties but is relied upon as evidence in other proceedings between strangers.

In reliance on the above authority, learned counsel sought to suggest that res judicata would not apply in our instant case, inter alia, because the second defendant is a stranger to the arbitration proceedings between the plaintiff and the first defendant.

[47] In response to the first defendant's authority, the plaintiff had on 7 February 2013 submitted a further submission in reply. The court has carefully considered the case of *Land Securities plc* as submitted by the second defendant and the submissions of both parties in this respect. In that case, the issue was whether the award of another arbitrator in respect of a comparable property was admissible in evidence in a rent review arbitration. The court held that an arbitration award is an arbitrator's opinion, after hearing the evidence before him, of the rent at which the premises could reasonably have been let. The court held that in principle, the judgment, verdict or award of another tribunal is not admissible to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties. In other words, whilst transactions in the open market may be relevant to show the reasonable market rent at which parties were prepared to transact, however, the opinion of an arbitrator of a arbitration done by him in respect of a different property was not relevant in a distinct and different arbitration proceeding.

[48] The court finds that the facts of the case of *Land Securities plc* are very different from the facts of our instant case where the arbitration was in respect of the same case, where the plaintiff and the first defendant were parties to the suit and the arbitration process; where the second defendant was a party to the suit and was present at the arbitration and there were clear findings by the arbitrator as to the connection with and the involvement of the second defendant re the subject matter of the claim.

CONCLUSION

[49] After carefully considering the issue before the court, the court agrees that in this case res judicata would apply and the second defendant would be estopped from raising issues which had already been decided upon by a court of competent jurisdiction. And now, relating the court's finding on the issue of res judicata with the first issue on the scope of questions that can be posed to the arbitrator in this case, the court finds that the general principle is that the arbitrator is a competent witness and, if called as a witness in respect of the arbitration that was conducted by him, may be asked such questions as to what had gone on during the arbitration before him, but cannot be questioned as to what had gone through his mind at the time when he made his decision nor the grounds of his decision. However, in this instant case, there is an additional issue of res judicata which would further reduce the scope of questions that can be put to the arbitrator. No questions should be put to the witness which has the effect of questioning the validity of the final award.

Scope of questions that may be posed to arbitrator defined.

Reported by Ashok Kumar